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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DAVLYN INVESTMENT PROPERTY  
MANAGEMENT,

Plaintiff and Respondent,

v.

TIMOTHY FULLER

Defendant and Appellant,

B203062

(Los Angeles County  
Super. Ct. No. PC038758)

APPEAL from orders of the Superior Court of Los Angeles County.

Barbara M. Scheper, Judge. Affirmed.

Timothy Fuller, in pro. per., for Defendant and Appellant.

Kimball, Tirey & St. John, Karl P. Schlecht and Abel Ortiz, for Plaintiff and Respondent.

Defendant, cross-complainant, and appellant Timothy Fuller (appellant), in pro. per., appeals from an August 23, 2007 order denying his ex parte motion to set aside an earlier judgment and from a September 6, 2007 order awarding sanctions against him for his violation of Code of Civil Procedure section 1008 (all future undesignated statutory references are to this code).<sup>1</sup> He contends neither order was supported by substantial evidence. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant was a tenant in an apartment complex owned by plaintiff, cross-defendant, and respondent Davlyn Investment Property Management (respondent). In response to an unlawful detainer action, appellant cross-complained alleging breach of contract and tort claims against respondent. The unlawful detainer was dismissed after appellant vacated the premises in April 2006. At a court-ordered mediation of appellant's cross-complaint on March 2, 2007, appellant and respondent stipulated to the following settlement terms: "(1) For the sum of \$427 to be paid by mail payable to [appellant at a specified address] on 3/2/07. [¶] (2) Cross-complaint dismissed with prejudice. Counsel for [respondent] to prepare a request for dismissal w/prejudice and submit the same to [appellant] who in turn will execute the request for dismissal and return to [respondent's counsel] by 3/9/07. . . . [¶] (3) It is understood and agreed by the parties that cashing of the above mentioned payment shall be deemed a waiver and settlement in full of all claims by [appellant] as against [respondent] as well as dismissal w/ prejudice

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<sup>1</sup> Appellant's notice of appeal does not specify from which order or judgment he is appealing (Cal. Rules of Court, rule 8.100(a)(2)), but his brief makes clear that these are the orders from which he intended to appeal and respondent has not claimed that it was misled; accordingly, we liberally construe the notice of appeal to be from those orders. (Cal. Rules of Court, rule 8.100(a)(2) (all future undesignated rule references are to the Cal. Rules of Court); *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 672, fn. 3.)

of [appellant's] claims against [respondent].”<sup>2</sup> Respondent mailed appellant the check on March 2, but to an incorrect address.<sup>3</sup> The check was returned to respondent and re-mailed to the correct address on April 11, but returned as “unclaimed” on April 30; it was reissued on July 10 and mailed to appellant at the address identified on his pleadings, but returned by the post office as “unclaimed” on July 13 with the notation “unknown sender” written on the envelope. Eventually, respondent’s counsel personally tendered the check to appellant at a hearing on August 23.

Meanwhile, appellant had not received the \$427 check when he informed respondent’s counsel on March 5 that he had reconsidered the settlement terms and wanted more money. The next day, respondent filed a Notice of Settlement of Entire Case, which was served on appellant at the West Hills address.

On March 7, appellant left respondent’s counsel a voicemail message indicating that appellant intended to make an ex parte application to the trial court the next day; the message did not state the nature of the relief appellant sought, nor the time or location of the application. Appellant failed to return respondent’s telephone calls seeking additional information. On March 8, appellant filed a written “Ex Parte Notice of Motion and Motion to Amend Cross Complaint,” which sought to add an allegation of “rent fixing/rent rigging” to the cross-complaint. Respondent opposed the application on the grounds, among others, that the notice failed to comply with rule 3.1204 because it did not specify nature of the requested relief, or the time and place of application. The trial court denied appellant’s request “for the reasons set forth in the opposition.”

On March 13, respondent filed a motion to enforce the settlement agreement, i.e., dismiss the cross-complaint. Hearing on the motion was set for April 26. Appellant did

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<sup>2</sup> All the relevant events occurred in 2007.

<sup>3</sup> The settlement agreement identified appellant’s address as: “25343 Silver Aspen Way #1323, Valencia, CA 91381.” But the check was mailed to: “25343 Silves Aspen Way #1323, Valencia CA 91381.” Beginning in June, appellant’s pleadings began indicating a West Hills address.

not file any opposition to this motion, but on April 17 he filed another “Ex Parte Notice of Motion And Motion To Amend Cross Complaint,” which was identical to the ex parte motion that the trial court had denied on March 8.<sup>4</sup> The trial court denied this second motion, noting that appellant had not complied with the requirements for a motion for reconsideration set forth in section 1008.

On April 25, the day before the hearing on respondent’s motion to enforce the settlement, appellant made an ex parte application for a continuance because he had to appear in court on another matter the same day. Noting that appellant did not “identify with specificity the other case that creates the conflict,” the trial court denied the request for a failure to show good cause.

Appellant did not appear at the April 26 hearing on respondent’s motion and he did not file any opposition. However, he telephoned the courtroom that morning to advise the trial court that he was in Las Vegas on the court appearance that created the conflict; the trial court offered to allow appellant to appear by telephone, but appellant declined. The trial court granted respondent’s motion and dismissed the cross-complaint with prejudice (the April 26th order).

On June 22, appellant filed an ex parte “Motion To Vacate [the April 26th Order].” The gist of this motion was that the order enforcing the settlement agreement should be vacated because appellant had never received the \$427 settlement check. Respondent opposed the motion and sought section 128.7 sanctions. The trial court denied appellant’s motion, explaining that the relief sought was not an appropriate subject of an ex parte application because such proceedings are reserved for exigent circumstances and, moreover, to the extent appellant’s application sought reconsideration of a prior order, it did not comply with section 1008. The trial court elucidated: “I cannot advise you how to [convince me that I should set aside the dismissal], but

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<sup>4</sup> The day before, appellant gave respondent’s counsel telephone notice of his intent to make an ex parte motion for “473 relief” the next day; appellant refused to further clarify the nature of the relief he was seeking.

typically I see a motion to set aside a dismissal under grounds of [section] 473 of the Code of Civil Procedure.” The trial court denied respondent’s sanctions request because respondent did not comply with the safe harbor provision of section 128.7 subdivision (c)(1).

On June 25, appellant filed a noticed “Motion For Discretionary Relief Or In The Alternative Mandatory Relief,” which was set to be heard on August 27 (the section 473 motion). The gist of this motion was that appellant was entitled to mandatory section 473 relief because he had yet to receive the \$427 settlement check.

In a letter to appellant dated July 10, apparently intended to comply with the section 128.7, subdivision (c)(1) safe harbor requirement, respondent’s counsel demanded that appellant withdraw the section 473 motion and informed him that if he did not do so, respondent would file a motion for sanctions, which the letter stated was enclosed. Appellant did not withdraw the section 473 motion and on August 3, respondent filed a motion for sanctions in the amount of \$2,500 (the section 128.7 motion), which was set for a hearing on September 6. But this motion was flawed in two respects: first, neither the motion nor counsel’s supporting declaration showed that respondent had complied with the safe harbor provisions of section 128.7, subdivision (c)(1); and second, the proof of service attached to the motion misidentified the document served as a Notice of Motion and Motion For Enforcement Of Settlement.

On August 23, while appellant’s section 473 motion and respondent’s section 128.7 motion were still pending, appellant once again sought ex parte relief in the form of a pleading captioned “Notice of Motion and Motion to Set Aside [the April 26th Order].” The stated grounds of the motion were that (1) because of health problems, appellant would be unable to attend the August 27 hearing on respondent’s section 128.7 motion; (2) the April 26th order should be set aside because it was based on misrepresentations; and (3) respondent’s section 128.7 motion should be taken off calendar. At the ex parte hearing that day, the trial court admonished appellant for filing another repetitive, ex parte pleading: “[W]e have had this conversation I think before. You simply cannot keep doing this. This motion you brought today is in direct violation

of section 1008 of the Code of Civil Procedure which is a motion for reconsideration. You have asked me to do this before on ex parte notice, I have refused to do it, and now you are doing it again and you have brought counsel down here again. [¶] That conduct is subject to sanctions and we will have a hearing regarding the sanctions issue separate and apart from what [respondent] may be complaining about because I specifically told you that this is not something I am taking up on an ex parte notice and you have done it again, and I don't know why. [¶] . . . You have the matter set for hearing already on September 6th on proper notice. That was the day that you picked. You are going to be heard on that date. [¶] Why would you file the same document as one already filed September 6 and already rejected by this court? I explained to you why I was rejecting it, and then you don't comply with [section] 1008 in any way, shape or form. That is not going to be tolerated, [appellant]. This [is] unacceptable."

Also at this hearing, respondent's counsel personally tendered to appellant the \$427 settlement check, but appellant refused to accept it, telling the trial court that he understood cashing the check would release respondents. The trial court explained that appellant could accept the check without cashing it, but the court would "not . . . entertain any arguments . . . down the road that, in fact, they have not lived up to their agreement when you have rejected the payment, all right?"

Finally, it was mutually agreed at this hearing that both noticed motions (respondent's section 128.7 motion and appellant's section 473 motion) would be heard on September 6. The trial court also gave notice that it would hear argument regarding sanctions against appellant pursuant to section 1008, subdivision (d) for his filing of the duplicative ex parte application on August 23. Appellant and respondent filed written briefs regarding the section 1008 sanctions on August 29.

Following a hearing on September 6, the trial court: (1) denied appellant's section 473 motion, reasoning that appellant had "failed to offer any legally cognizable excuse for his failure to oppose the motion to enforce the settlement agreement. . . . The court accepts [respondent's] explanation regarding its efforts to send the settlement check to [appellant] and finds no evidence of a willful misrepresentation to the court in that

regard. [Appellant's] refusal to accept the check at this time, does not require the court to reverse its decision to enforce the settlement agreement;" (2) denied respondent's section 128.7 sanctions motion, characterizing appellant's section 473 motion as "the only proper motion of the many similar requests filed by [appellant];"<sup>5</sup> and (3) awarded sanctions against appellant in the amount of \$1,900 pursuant to section 1008, subdivision (d).

Appellant filed a timely notice of appeal.

## DISCUSSION

### 1. *Trial Court Properly Denied Appellant's August 23 Ex Parte Motion*

Appellant contends it was error for the trial court to deny his August 23 ex parte motion to set aside the April 26th order. As we understand his argument, it is that the procedural requirements concerning ex parte applications are not applicable to motions to set aside allegedly void orders and the April 26th order was void because it was based on respondent's misrepresentation to the trial court that respondent had satisfied its obligations under the settlement agreement to pay appellant \$427. We disagree.

Ex parte applications for relief are permitted only in limited circumstances. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 58, p. 484.) One such circumstance is "[w]here there is pressing necessity for immediate relief . . . ." (*Ibid.*) Rule 3.1200 et seq. govern the procedural requirements of ex parte applications for relief. These requirements include that the application be accompanied by a declaration stating the "notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 3.1203, the applicant informed the opposing party where and when the application would be made[.]" (Rule 3.1204(b)(1).) "If an ex parte application has been refused in whole or in part, any subsequent application of the

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<sup>5</sup> The trial court also noted that the motion and supporting declaration did not establish whether respondent had satisfied the safe harbor provision.

same character or for the same relief, although made upon an alleged different state of facts, must include a full disclosure of all previous applications and of the court's actions." (Rule 3.1202(b).) The ex parte applicant "must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Rule 3.1202(c).) An ex parte application that fails to comply with these rules is properly denied. (*Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 977.)

Appellant's August 23 ex parte application satisfied none of these requirements. Most crucially, appellant did not "make an affirmative factual showing . . . of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Rule 3.1202(c).) It seems unlikely appellant could have made any such showing inasmuch as his noticed motion seeking the same relief was set for hearing several days later. Appellant's failure to make this showing warranted denial of his ex parte application.

## 2. *Section 1008, Subdivision (d) Sanctions Were Proper*

Appellant contends the sanctions award against him was improper "because [he] had a legitimate medical condition the court was aware of." He argues that the sanctions "were improper because the trial court had close to a year of advanced notice of [appellant's] medical condition . . . ." The argument misses the mark.

In part, section 1008 provides: "(b) A party who originally made an application for an order which was refused . . . may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Moreover, the moving party must provide a "satisfactory explanation as to why he or she failed to produce the evidence at an earlier time." (*Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1028 (*Lucas*).) Trial courts are without



jurisdiction to consider a renewed motion that does not comply with section 1008. (§ 1008, subd. (e).)

A violation of section 1008 may be punished with “sanctions as allowed by Section 128.7.” (§ 1008, subd. (d).) Section 128.7 allows the trial court to award sanctions upon a determination that a motion was presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the claims made in the motion are not warranted under the law; or the factual allegations are without evidentiary support. (§ 128.7, subd. (c); see *Lucas, supra*, 39 Cal.App.4th at p. 1028 [construing § 128.5].) “When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.” (§ 128.7, subd. (e).)

Here, appellant’s August 23 ex parte motion to set aside the April 26th order sought the same relief as did his previously refused June 22 ex parte motion to vacate the April 26th order.<sup>6</sup> But his affidavit in support of the August 23 ex parte motion did not comply with section 1008, subdivision (b). Most significantly, appellant’s supporting affidavit did not show “what new or different facts, circumstances, or law are claimed to be shown.” This was despite the fact that the trial court had alerted appellant to the requirement that he comply with section 1008 at the hearing on June 22. Thus, the motion violated section 1008, subdivision (b).

At the sanctions hearing on September 6, after identifying the duplicative motions appellant had filed seeking to set aside the April 26th order, the trial court stated: “the August 23rd one, [appellant], I find the most troubling because at that point you had your motions on file for the relief, the same relief that you were requesting on August the 23rd. . . . [¶] I can conceive of no possible reason why you thought it would be appropriate or helpful to come in on that day and basically get an earlier ruling on the same motion as you have gotten today. [¶] So it is the court’s intention to sanction you

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<sup>6</sup> Appellant was seeking the same relief in his noticed section 473 motion for relief, which was still pending at the time he filed the August 23 ex parte motion.

for the August 23rd ex parte because it did not comply with [section] 1008.” The trial court explained, “I am not denying you the relief you request because of any sort of time limitation on your attack [on the April 26th order]. My complaint is that you have come in here on three ex partes, one of them filed well after you already had a noticed motion, all of them asking for the same relief, which is basically to set aside the dismissal and find the settlement agreement no good. [¶] There has been no compliance with [section] 1008. You have never set forth the facts. . . . You have to list all the times you have done it, what I have done in response, and why you are doing it now in another guise.”

Implicit in the trial court’s comments is a finding that appellant brought the August 23 ex parte motion for an improper purpose. This finding was amply supported by the evidence that appellant brought the ex parte motion after similar ex parte motions had already been denied and when a noticed motion seeking the same relief was already pending. The trial court’s comments also satisfied its obligation of describing the conduct determined to constitute a violation of the statute. (§ 128.7, subd. (e).) Finally, the totality of the court’s statements coupled with its earlier refusal to award sanctions to respondent, reflects the court’s reasoned exercise of discretion in awarding sanctions on September 6.

## **DISPOSITION**

The August 23 order denying appellant's ex parte motion of that date and the September 6 order awarding sanctions against appellant are affirmed. Appellant is ordered to pay respondent's costs on appeal.

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RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

O'NEILL, J.\*

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\* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.